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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 272.

WILLIAM I. COHEN,
Petitioner,
vs.
PLATEAU NATURAL GAS COMPANY, DRILLERS GAS COMPANY, PAUL KITCH and VULCAN MATERIALS COMPANY,
Respondents.

BRIEF

Of Respondents, Plateau Natural Gas Company, Drillers Gas Company, Paul Kitch, and Vulcan Materials Company, in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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STATEMENT.

Petitioner seeks a writ of certiorari to the Court of Appeals for review of that Court's decision, reported at 303 F. 2d 273, dismissing an appeal for lack of jurisdiction. The specific jurisdictional question before the Court of Appeals was whether or not a trial court may grant an *ex parte* order extending the time to appeal after the original time has expired. A collateral question was whether or not an affidavit stating that one counsel of a litigant did not receive notice of the order and judgment is sufficient to constitute excusable neglect under the Federal Rules, when it is conceded that another counsel of record received timely notice.

ARGUMENT.

I.

The primary question has been considered by a Federal appellate court, insofar as counsel can ascertain, only once prior to the decision in this case, when the Court of Appeals for the Ninth Circuit, in **North Umberland Mining Company v. Standard Accident Insurance Company**, 193 F. 2d 951 (1952), held that an *ex parte* order granting a time extension after the time had expired was void. The Court of Appeals in this case followed and relied on the **North Umberland** case.

There is not, therefore, a conflict between Courts of Appeal, which is one of the guide lines for granting certiorari set out in this Court's Rule 19.

The question which petitioner seeks to have this Court decide is a narrow application of the Federal Rules of Civil Procedure, and is not of sufficient importance to warrant review by this Court under its announced policy of refusing certiorari "* * * except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." **Layne & Bowler Corporation v. Western Well Works, Inc.**, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923), at p. 293 of 261 U. S.

II.

The decision by the Court of Appeals is clear and correct and there is no need for this Court to review this matter.

Petitioner seeks to have Rule 6 (b) and Rule 73 (a) of the Federal Rules of Civil Procedure construed without reference to each other and asserts that they are "incompatible, independent and have no relation to each

other" (Petition, p. 8). [Rule 6 (b) and the pertinent part of Rule 73 (a) are reprinted in the Appendix hereto.]

This contention is made, notwithstanding the fact that they are by their very terms related, on the ground that a court cannot extend the time to appeal under Rule 73 before the expiration of the original appeal period and that the right to extend the time for appeal can be exercised only after the expiration of the time period. Rule 6 (b) specifically provides that for cause shown, a court, with or without motion before and upon motion after the expiration of the original period, may grant an extension, and in plain language limits any extension under Rule 73 (a) to the period specified therein.

Even if petitioner's contention were correct, it does not follow that an extension of time within which to appeal after the expiration of the original time can be granted *ex parte*.

The *ex parte* order granting the extension after the expiration of the appeal time violated the Federal Rules, and was void *ab initio*.

III.

The Court of Appeals did not decide the question of excusable neglect but expressed doubts as to its existence. However, since petitioner has raised the question, respondents feel that certain aspects should be brought to the Court's attention.

Excusable neglect, under Rule 73 (a), must be based on a failure to learn of the entry of judgment. The petitioner was notified of the judgment, in that it is conceded that his local attorney received timely notice. Petitioner, however, contends that this fact is of no consequence.

Petitioner not only desires to have this Court review harmonious decisions of two Courts of Appeal and change the express language of the Rules of Civil Procedure, but

he also seeks to have the rules of the District Court declared without substance. The petition implies that the Rule III (6) of the District Court of Kansas [reprinted in the Appendix hereto] is without effect and is to be disregarded.

In accordance with that rule, local counsel appeared for the petitioner. Petitioner concedes that this counsel received timely notice of the judgment of the District Court. The obvious purpose of the District Court rule is to make sure that there is a local attorney to receive notice and upon whom service can be made, in order that the Court's business may be expeditiously handled.

Petitioner contends that service of notice on this local attorney should not be binding, which would, of course, make the rule useless.

Petitioner's position is that unless there is a showing that notice was received by the out-of-state attorney, effective notice was not received. Service on an attorney of record is service on a party. (Rule 5 (b), Rules of Civil Procedure.) Unless District Courts are to be rendered impotent in cases involving out-of-state attorneys, the local rule of the District Court must be allowed to retain its substantive meaning and not be emasculated of all force.

Moreover, even if Rule III (6) of the District Court is disregarded, the affidavit filed by Mr. Palley fails to show the excusable neglect necessary to comply with rule 73 (a). The rule requires a showing that the party failed to learn of the judgment, and this affidavit merely states that Messrs. Palley and Kogan did not learn of it.[1]

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[1] Cf. Brahms v. Moore-McCormack Lines, Inc., 18 F. R. D. 502 (S. D. N. Y. 1955), in which the District Court denied a motion for extension of time in which to file a notice of appeal. In that case the trial judge states:

"There is no statement that it is the office practice of plaintiff's attorney to rely on the absence of a notice of entry from

The Clerk of the District Court served the petitioner by serving his attorney of record in Kansas. The Clerk also mailed copies of the order and judgment to all counsel of record and noted so on his docket. Service on the out-of-state counsel was complete when copies of the judgment were mailed. See Rule 5(b) of Rules of Civil Procedure [reprinted in the Appendix hereto], which states that "service by mail is complete upon mailing."

The petition for writ of certiorari should be denied because:

(1) There is no showing of a question of sufficient importance to justify review by this Court.

(2) The decision of the Court of Appeals in dismissing the appeal was correct in that:

(a) The *ex parte* order extending the time within which to appeal was void *ab initio*.

(b) There was no showing of excusable neglect which would justify an extension of time.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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the office file as proof that no judgment has been entered. There is no statement that the office practice is to file notices of entry without bringing them to the attention of the lawyer members of the staff. There is no affidavit by any member of the office staff explaining how the postal card found its way into the files. There is not even a statement that none of the lawyers in the office knew of the existence of the notice of entry let alone an affidavit from each that he had no such knowledge."

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APPENDIX.

DISTRICT COURT OF KANSAS RULE III (6):

Any attorney duly and regularly admitted to practice in the courts of record of another state or territory and not residing in the State of Kansas, having professional business in this court may, upon motion, be admitted for the purpose of said business only, when it is made to appear that he or she has associated and personally appearing with him or her in the action an attorney who is a resident of, or who maintains his or her law office within, the State of Kansas and who has been duly and regularly admitted to practice in this court. Such resident attorney shall sign the first pleading filed and continue in the case unless other resident counsel be substituted. Any notice, pleading or other paper may be served upon the resident attorney with the same effect as if personally made on such non-resident attorney within the state.

RULES OF CIVIL PROCEDURE.

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(a) SERVICE: • • •

(b) SAME: HOW MADE. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this

rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

RULE 6. TIME.

* * * * * * *

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them.

RULE 73. APPEAL TO A COURT OF APPEALS.

(a) WHEN AND HOW TAKEN. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a

party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. • • •